No. 98-1037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

Petitioner,

vs.

LEE ROBBINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED DECEMBER 17, 1998
CERTIORARI GRANTED MARCH 8, 1999

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ABBREVIATIONS KEY TO DOCUMENTS PRESENTED TO THE COURT

A.G.A.C.	Amicus curiae brief filed by 15 state attorneys general in support of the Warden
App.	Appendix to Robbins's merits brief in this Court
C.A.A.C.	California Academy of Appellate Lawyers' amicus curiae merits brief in support of the Warden
C.J.A.C.	Criminal Justice Legal Foundation's amicus curiae merits brief in support of the Warden
C.T.	Clerk's transcript at trial
D.A.C.	Delgado's amicus curiae merits brief in support of Robbins
J.A.	Joint Appendix
J.A.C.	Retired appellate judges' amicus curiae merits brief in support of Robbins
N.A.C.	National Association of Criminal Defense Lawyers' amicus curiae brief in support of Robbins
R.B.	Robbins's opposition brief on the merits
Ret.	Warden's return in the United States District Court

R.O.C.	Robbins's opposition to the petition for writ of certiorari
R.T.	Reporter's transcript at trial
W.O.B.	Warden's opening brief on the merits
W.R.C.	Warden's reply to opposition to petition for writ of certiorari

INTRODUCTION

Respondent Lee Robbins has filed a brief in which he argues that the Court should not reach the issues on which it granted certiorari. He first urges that the issue of the validity of California's no-merit appeals procedure is not properly before the Court because state counsel should have filed a merits brief. Robbins identifies nine arguable issues and invites the court to consider them as though he were filing an *Anders* brief in this Court. *Anders v. California*, 386 U.S. 738 (1967). In the Warden's view, this Court should not inquire into the validity of these alleged issues unless and until the Court concludes that the no-merit procedure actually employed in California was impermissible. Even then, inquiry into the merits issues should be conducted in accordance with a *Strickland* standard of prejudice and not simply as if this Court were sitting as a super-California Supreme Court and rehearing the state appeal. If the state has followed a valid procedure, a prisoner cannot ask the federal courts to decide whether his state-law issues were arguable.

In a second attempt to avoid coming to terms with the real issue, Robbins argues that the brief in his case did not comply with California law. *People v. Wende*, 25 Cal. 3d 436 (1979). The *Wende* procedure remains California's legitimate interpretation of *Anders*.

The premise for Robbins's argument is that a competent lawyer can always find *something* to argue and that the failure to find that *something* is the mark, in the colorful argot of the Los Angeles County Jail, of a "dumptruck." In fact, a competent lawyer is an ethical lawyer, one who understands his duties to his client and the court. A competent lawyer knows that the record limits what he can and should argue. A competent lawyer will never argue frivolous, meretricious or baseless claims. Robbins's state appellate counsel grasped these limits, as Robbins himself does not.

ARGUMENT

I. STATE APPELLATE COUNSEL'S *WENDE* BRIEF COMPLIED WITH ROBBINS'S 6TH AND 14TH AMENDMENT RIGHTS

A. California's *Wende* procedure safeguards indigent no-merit appellants' due process, equal protection and counsel rights.

Robbins's state attorney properly filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979). J.A. 26-37. The question before this Court is whether California's *Wende* procedure satisfies the Sixth and Fourteenth Amendments. It does.

Robbins seeks rigid, unyielding adherence to the language in *Anders*, shrugging off the notion of *Anders* as a "prophylactic framework[.]" *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987);R.B. 24-30. He fails to take into account the changes in the legal system in the 30 years since *Anders*. When *Anders* was decided in 1967, California had no institutional checks on appointed counsel who filed no-merit briefs. C.A.A.C. 2. The no-merit procedure in *Anders* itself consisted of a conclusory statement ("I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal"), which did not demonstrate to the reviewing court that appellate counsel had read the record and concluded that there were no nonfrivolous issues. *Anders*, 386 U.S. at 742-43.

In 1979, the California Supreme Court decided *Wende*, which expanded the rights of indigent appellants. In 1985, California established the appellate projects, which devote substantial resources to the training, management and review of appointed counsel. C.A.A.C. 8. Today, indigent appellants, protected by *Wende* and the appellate projects, receive top-flight representation. *See* C.A.A.C. 8-13. A no-merit brief can only be filed only

with the supervising project attorney's consent. *Id.* at 11-12. California thus provides an indigent with a potential no-merit appeal with two independent advocacy reviews and a third independent review by the court. C.A.A.C. 13.

Robbins seems to suggest that, merits aside, retained lawyers who have a monetary incentive will always find an issue to raise, while appointed counsel, whose pay does not hinge on filing a merits brief, will sell their clients down the river. R.B. 28 n.17. This argument unjustifiably slurs both retained and appointed counsel. In *Anders*, Justice Stewart, writing in dissent, noted that the Court's "quixotic requirement" stemmed from "the cynical assumption" that appointed counsel's representation cannot be trusted. Justice Stewart refused to believe that such lawyers were so "lacking in diligence, competence, or professional honesty." *Id.* at 746-47. It is no less an affront for Robbins to imply that retained counsel can be counted on to fabricate issues for money. More to the point, Robbins has shown neither proposition to be true.

The primary issue before this Court is whether California's *Wende* procedure for indigent appellate representation passes constitutional muster. If it does, the question of whether *Anders* is somehow preferable to *Wende* simply does not arise. R.B. 26-30. California has addressed pertinent constitutional concerns about fairness and institutional quality control by establishing the appellate projects, which carefully match lawyers to cases and provide two separate reviews before a third independent review by the appellate court in no-merit cases. This procedure fully satisfies due process and equal protection. Indeed, indigent appellants with no-merit briefs receive substantially more representation and review than do appellants with potentially meritorious claims.

B. *Wende* is not contrary to *Anders*.

Robbins is wrong when he suggests that *Wende* is contrary to *Anders*. R.B. 35. *Wende* is California's state-authorized approach to achieving the Sixth and Fourteenth Amendment goals articulated by the *Anders* Court. Although it does not slavishly adhere to the suggested *Anders* procedure, *Wende* is a variation on the *Anders* theme that is congruent with its goals. *In re Sade C.*, 13 Cal. 4th 952, 981, 55 Cal. Rptr. 2d 771 (Cal. 1996). It is therefore not contrary to *Anders*. *Anders* is not, after all, "an independent constitutional command that all lawyers in all proceedings, must follow these particular procedures" but rather "establishe[s] a prophylactic framework" for the right to counsel. *Pennsylvania v. Finley*, 481 U.S. at 554-55. This Court has recognized that states may satisfy the Sixth Amendment concerns that underlie *Anders* in a variety of ways. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 435-36 (1988). Robbins never addresses this essential point.

Anders requires "a brief referring to anything in the record that might arguably support an appeal." *Anders*, 386 U.S. at 744. California has determined that appellate counsel can satisfy that requirement by providing the court with statements of the case and facts with citations to the trial record.[1] J.A. 27-34. Counsel's procedural and factual summaries inform the court that counsel has read the record and assist the court in its independent review, without requiring the lawyer to argue against his client by listing rejected claims. Under *Wende*, counsel need not seek to withdraw, because he has not informed the court of his failure to find nonfrivolous issues. *Id.* at 442.

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1. However, counsel must first justify the filing of a no-merit brief to the supervising appellate project attorney. C.A.A.C. 11-.5.

Robbins contends that the California Supreme Court has actually disapproved of *Wende*, and that there is no longer a *Wende* process for this Court to assess. R.B. 30-35. This assertion is based on a misreading of *In re Sade C.*, 13 Cal. 4th 952, 980 n.8. (Cal. 1996). Robbins argues that in *Sade C.* the California Supreme Court effected a retrenchment from *Wende*. R.B. 30-34. He goes so far as to state that California does not permit counsel to file a no-merit brief that "fails to identify any legal issues." R.B. 30, citing *Sade C.* at 980 n.8. Accordingly, Robbins insists, *Wende* has been limited, if not overturned *sub silentio*. R.B. 33-34. *Sade C.* did no such thing. In fact, *Sade C.* does not bury *Wende*, it praises *Wende*.

In the first place, the state high court made it clear that the issue in *Sade C.* had nothing to do with evaluating *Wende*'s compliance with the requirements of *Anders*.

> An issue arose at the time *Wende* was decided . . . as to whether *Wende* is at variance with *Anders*. . . . The issue of *Wende*'s conformity with *Anders* in this regard is not presented in this cause. We leave its resolution to another day.

Sade C., 13 Cal. 4th at 981. Nonetheless, in dicta, the *Sade C.* court noted with approval that *Wende* improves on the *Anders* formula. The court observed that *Wende* required an independent court review "whenever counsel submits a brief which raises no specific issues . . . ." *Sade C.*, 13 Cal. 4th at 980. Implicit in the phrase "raises no specific issues" is the court's understanding that counsel are *not* required to list issues they have rejected. *Sade C.* is thus an endorsement of *Wende*, not a criticism.

Robbins also argues that California's true procedure is actually "identical" to that set forth in *Douglas v. California*, 372 U.S. 353 (1963), and *Anders*. R.B. 32-34. Curiously, Robbins overlooks the fact that the Ninth Circuit and two of his own amici sharply dispute his interpretation.

In *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1998), the Ninth Circuit described the no-merit brief filed on behalf of Davis as "indistinguishable" from the brief filed in *Robbins* and held that although "the no-merit brief complied with *Wende*, the requirements of *Anders* 'were not met.'" *Davis* at 497-98, citing *Robbins v. Smith*, 152 F.3d. 1062, 1067 (9th Cir. 1998). In *Delgado v. Lewis*, ___ F.3d ___, 1999 U.S. App. LEXIS 13759 (9th Cir. 1999), the court reiterated the *Robbins* holding yet again, finding that "*Wende* procedures do not comport with the 'very low threshold' established by . . . *Anders*." *Delgado* at *15. *See also* J.A.C. 3-8; N.A.C. 7; *but see* A.G.A.C. 13; C.J.A.C. 26-27; C.A.A.C. 2-3.

Contrary to Robbins's claims, *Wende* differs from *Anders* and improves upon it. The significant point is that the Sixth Amendment guarantees counsel to indigents, mostly as a matter of equal protection, perhaps partly as a matter of due process. *Anders*, 386 U.S. at 741. California provides indigents with a thoughtfully-assigned lawyer, expert supervision, two advocates' reviews and the *Wende* guarantee of an independent review by the court of appeal. Robbins asserts that counsel is reduced to being "merely a formal presence[,]" R.B. 38, but California courts have held that counsel's remaining on the case benefits both the client and the court. *Sade C.*, 13 Cal. 4th at 981, citing *Wende*, 25 Cal. 3d at 442. California's indigent no-merit procedure meets constitutional demands.

II. COUNSEL'S PERFORMANCE SHOULD BE EVALUATED UNDER *STRICKLAND*

A. Robbins forfeited his claim that the Warden waived the prejudice arguments.

The Warden initially asserted in his district court return, Ret. 52-53, that prejudice should be tested under *Strickland v. Washington*, 466 U.S. 668 (1984). After the

district court had rejected that argument and asked the Warden's counsel about the consequences of state counsel's failing to raise an arguable issue, counsel replied that it would "a serious problem," since under *Penson*, prejudice would be presumed.[2] J.A. 47. The Warden did not assert the *Strickland* point in the Ninth Circuit.

Robbins contends that the Warden waived the *Strickland* prejudice argument by not asserting it in the Ninth Circuit. R.B. 39-40. However, Robbins forfeited his objection on this basis by failing to raise it in his opposition to certiorari. R.O.C. 20-22. Under Rule 15.2 of the Rules of the Supreme Court, Robbins should have pressed his objection in his opposition to certiorari to permit the Court to decline the case if it deemed the point precluded. *Jones v. United States*, 1999 U.S. LEXIS 4201, *40 n.12 (1999), citing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996), and *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). Without opposition on this point, the Court accepted the case for certiorari on all three questions presented by the Warden. Robbins's failure to raise the issue in his opposition is a default this Court should not forgive. *Jones* at *40.

Assuming the Court does not bar Robbins from arguing that the Warden waived the *Strickland* point, it has discretion to address the standard for prejudice despite the Warden's failure to raise it in the Ninth Circuit. *Id.* First, the standard for prejudice is "fairly included" within this Court's consideration of the validity of *Wende*. *See Jones* at *40 n.12. In addition, the *Strickland* prejudice prong is not a separate harmless-error inquiry, but part of the prima facie showing of ineffective assistance. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2. (1993). Second, the Warden presented the issue in his return, and the district court rejected it. Third, the issue

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2. *Penson v. Ohio*, 488 U.S. 551 (1988).

has been fully briefed in this Court. W.O.B. 30-42; R.B. 39-44; *Jones* at *40. It would not be unfair to the Ninth Circuit, or to Robbins, to reach the *Strickland* point, because that court has since expressly applied a presumed prejudice standard in this context in two cases where the state formally asserted that prejudice should be assessed under *Strickland*. *Delgado v. Lewis*, 1999 U.S. App. LEXIS 13759 at *15-16; *Davis v. Kramer*, 167 F.3d at 499 n.5.[3] Finally, *Anders* antedated *Strickland* by 17 years and does not address the matter of prejudice. Comity, federalism and judicial efficiency would best be served by the Court's determining whether it is necessary to reverse a state conviction even if the defendant suffered no harm from counsel's failure to assert an issue on appeal. *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

B. *Strickland* is the appropriate test for prejudice.

As the Warden urged in his opening brief, this Court should recognize a *Strickland* test for prejudice in cases where appointed counsel have failed to raise nonfrivolous issues on appeal. Under *Strickland*, the federal court would not need to determine that the assertedly arguable issues were frivolous, only that their omission did not undermine confidence in the outcome. A prejudice analysis fosters comity by honoring the states' criminal judgments, except where counsel's deficient performance rendered the proceeding unfair or the result unreliable. *Lockhart*, 506 U.S. at 369-70; *Strickland*, 466

3. It can even be stated with assurance that the *Robbins* panel itself would have rejected a *Strickland* analysis in favor of a presumption of prejudice. Chief Judge Hug wrote *Robbins*, with Judges Reinhardt and Pregerson concurring. Judge Reinhardt was the author of the 3-0 decision in *Davis*, and Judge Pregerson was a member of the 3-0 panel in *Delgado*.

U.S. at 687. Robbins's suggestion that a rule of presumed prejudice would somehow further comity, R.B. 40, is palpably absurd.[4] A prejudice analysis dooms all nine of the issues Robbins has characterized as arguable.[5]

Strickland should also be adopted in fairness to appellants whose counsel file merits briefs. If state counsel files a one-issue brief, his client receives neither an independent review nor the windfall of an automatic new appeal when counsel fails to raise additional arguable issues. Quite the contrary: this Court has praised counsel who "winnow[] out weaker arguments." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In fact, to make a prima facie case of ineffective assistance of counsel, a defendant must normally show both subpar performance and prejudice. *Lockhart*, 506 U.S. at 369 n.2. Only after the prima facie case has been made is the case tested for prejudice. *Id.* As a matter of equal protection, no-merit indigents should not receive a windfall unavailable to all other appellants.

By way of analogy, most constitutional errors are subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). The requirement that a petitioner show harm should be applied to the evaluation of counsel's performance in the filing of an indigent no-merit brief on appeal, because such errors do not "defy analysis by 'harmless error' standards" or "transcend[] the criminal process." *Id.* at 309, 311. This is particularly true of evaluating appellate performance, because the trial is the "main event," and the Constitution does not require a state to provide an appellate process for criminal defendants at all. *Goeke v. Branch*, 514 U.S. 115, 120 (1995); *Granberry*, 481 U.S. at 132. The sole purpose of

4. Robbins also argues that the *Anders* procedure is more efficient for federal-court review. R.O.B. 43-44. Whatever the merits of that observation, it is irrelevant to *Wende*'s constitutionality.

5. The same analysis shows them to be frivolous.

the appellate process is to correct errors which rendered the trial unfair. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

A rule of presumed prejudice would have been unnecessary even in *Penson v. Ohio*, 488 U.S. 75. If *Strickland* had been applied there, Penson would still have won a new appeal, because his attorney's failure to raise reversible constitutional error in the instructions defining the elements of the crime rendered the proceedings unreliable. *Lockhart*, 506 U.S. at 369-70.

Finally, Robbins suggests that his counsel abandoned him and that he was thereby denied counsel. R.B. 44. He is incorrect. Despite the mess Robbins had made of the trial record, state appellate counsel consulted with the appellate project, filed a brief to assist the court, obtained an independent review, and remained available to argue any issues the court might identify. Robbins does not suggest how his situation would have been improved by counsel's listing the frivolous issues he had rejected.

C. <u>There were no nonfrivolous issues</u>.

Robbins has argued that this Court need not address *Anders*, because counsel should have filed a merits brief asserting nonfrivolous issues. R.B. 12. As the Warden's record-based discussion of the issues will demonstrate, and state appellate counsel demonstrably understood, Robbins had no entitlement to a merits brief. The issues Robbins has presented in federal court are baseless.

In warning Robbins of the dangers of self-representation, the state trial court told him:

> You understand that you are probably going to make mistakes that might prejudice you, you are going to leave things out of the record that should be there, on appeal you are going to find deficiencies in the record that wouldn't be there if you were being represented.

J.A. 219. Truer words were never spoken.

Scrambling to avert the devastating consequences of his decision to represent himself at trial, Robbins asserted in the district court that his appointed appellate counsel failed to raise numerous arguable issues on direct appeal. After multiple rounds of briefing, the court relied on only two issues: the adequacy of the law library and Robbins's right to counsel. J.A. 49-53. The Ninth Circuit followed suit. J.A. 89. Robbins advances those two issues and adds seven others. R.B. 14-23. Although Robbins now suggests that these issues preclude this Court's reaching the merits of the *Anders* question, he has forfeited this argument by failing to raise it in his opposition to certiorari. Rule 15.2, Rules of the Supreme Court of the United States. His argument also fails on the merits. State counsel properly declined to assert these wholly frivolous issues. If *Strickland* had been applied, Robbins's state-court judgment would have been upheld, because there was no prejudice from failing to argue issues which were frivolous on the record Robbins had made.

Counsel is obligated to file a merits brief on direct appeal only if the record presents arguable issues. *Anders* 386 U.S. at 744. An arguable issue is a meritorious issue. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (Cal. 1981).[6] Under state law, matters outside the trial record cannot be considered on direct appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (Cal. 1979).

In unspoken acknowledgement of the weakness of his merits arguments, Robbins urges this Court to "presume that arguable issues exist[,]" because the Warden stated that the Ninth Circuit's finding of two arguable issues was not relevant to the questions presented. R.B. 17, citing

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6. The words "meritless," "frivolous," "wholly meritless" and "without merit," are used interchangeably. Junkin, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders*, 67 Texas L. Rev. 181, 188 n.54 (1988).

W.R.C. 5 n.3. He has wrenched the comment out of context. The Warden has challenged the existence of arguable issues at every stage of this litigation. W.R.C. 5 n.3. There is no waiver and no basis for a presumption. W.R.C. 4-5, 5 n.3, 7. The nonfrivolous issues Robbins now asserts are designed to distract the Court from considering the heart of this case, the validity of California's no-merit brief procedure. W.R.C. 4-5.

Robbins cannot blink away the hard facts of the record. State appellate counsel could not file a merits brief, because, as the trial court had warned and Robbins impliedly admits, Robbins failed to preserve any issues at trial. R.B. 2. As demonstrated below, the nine issues he now raises are meritless.

1. Refusal to provide funds for a forsenic expert and investigator. R.B. 18.

Robbins was allocated $500 for an investigator, because that was all he asked for. J.A. 251-253, 263. The guidelines for investigative funding apply to represented and pro per defendants alike. J.A. 240-41. The trial judge told Robbins that if the investigator would not accept the $500 that had been allotted, Robbins would have to prepare a court order authorizing the expenditure of an additional $500. J.A. 263-64. The judge said he would authorize up to $5,000 if Robbins followed the rules and filed the appropriate orders. J.A. 241-42, 251-53. Robbins never did so.

Robbins also cites as an issue the court's failure to give him funding for a forensic expert. R.B. 18. Again, the record belies his claim. He moved a week before trial for yet another continuance and, among other things, a forensic expert. J.A. 268-82. In his written offer of proof, Robbins said the forensic expert would disprove the People's case and remove all doubt as to his innocence. He did not say how. J.A. 270. The allowance of funds for

investigation is predicated upon the indigent's showing of need. Failure to meet that burden defeats an appellate claim of error. *People v. Beardslee*, 53 Cal. 3d 68, 100, 279 Cal. Rptr. 276 (Cal. 1991). Robbins did not make a sufficient showing. An appellate claim would have failed.

In any event, the trial court denied the continuance, but never ruled on the forensic expert, J.A. 283-99, and Robbins never pressed for a ruling. Robbins thus forfeited the issue by failing to obtain a ruling. *People v. Danielson*, 3 Cal. 4th 691, 729, 13 Cal. Rptr. 2d 1 (Cal. 1992). There was nothing to appeal. Even assuming, however, that counsel could have argued *something*, Robbins cannot show that the issue was a likely winner that touched on the fairness of his trial. He certainly cannot show that he was deprived of a federal constitutional right.

2. Alleged failure to provide an adequate law library. R.B. 19.

The issue of the adequacy of the law library was fully discussed in the Warden's opening brief. W.O.B. 36-38. The record shows that Robbins never complained at trial about the law library or documented its alleged deficiencies. The trial court's warnings to Robbins about the obstacles he would face as a pro per defendant, including a bleak description of the library, were not evidence that would have warranted raising the issue on direct appeal, particularly in light of Robbins's assertion a week before trial that "[he was] doing okay as far as the law work and stuff[,]" but needed someone to help him with the public speaking. J.A. 255-57, 320.[7] Robbins's personal testimonial to the library's adequacy was buttressed by the research evidenced in his pro per

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7. *Faretta v. California*, 422 U.S. 806 (1975).

pleadings. In his motion for a continuance, for example, Robbins cited ten cases and the Constitution. J.A. 268-71.

In his merits brief, Robbins improperly includes an appendix containing two pleadings ostensibly filed in the trial court. R.B. 7-9, citing his own App. A.[8] To this day, Robbins has never presented the law library claim to the state supreme court in any guise. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Even worse, he now attempts to fundamentally alter his claim by bringing in new evidence in his appendix. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617 (1986). The claim and the documents should be excluded. They are unexhausted.

Even if the Court considers the extra-record evidence, the issue is meritless. In the written motion, Robbins stated, "The law library was found to be inadequate back in 1975 and hasn't been updated since." App. A 7. He made no showing of current deficiency or actual prejudice, nor could he have done so in view of his numerous and lengthy filings in the trial court. *See* J.A. 268-82. Thus, even had his conclusory allegations shown the law library to be theoretically subpar, Robbins did not "demonstrate that the shortcomings in the library . . . hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). The library issue lacked any basis in the appellate record.

3. **Refusal to provide advisory counsel**. R.B. 19-20.

The state court's refusal of advisory counsel has been thoroughly addressed in the Warden's opening brief. W.O.B. 39-41. The appointment of advisory counsel is a matter of trial court discretion under state law. *People v.*

8. The Warden has moved to strike appendix A on grounds that it contains matters which are unexhausted, outside the record, tardy and forfeited under this Court's rules.

Clark, 3 Cal. 4th 41, 97, 10 Cal. Rptr. 2d 554 (Cal. 1992). Citing *People v. Bigelow*, 37 Cal. 3d 731, 742-46, 209 Cal. Rptr. 328 (Cal. 1984), Robbins disingenuously suggests the denial of advisory counsel "may be an abuse of discretion, which is reversible per se." R.B. 19. In *Bigelow*, the state court found prejudicial error where a judge in a capital trial believed he lacked discretion to appoint advisory counsel. *Id.* at 743. The instant record shows the judges who ruled on Robbins's repetitive motions for advisory counsel fully understood and properly exercised their discretion. J.A. 248-49, 266-67, 324. There was no arguable issue here.

4. **Refusal to permit Robbins to withdraw his *Faretta* waiver**. R.B. 20.

The Warden countered this claim in his opening brief, W.O.B. 41-42, and in his reply to the opposition to his petition for certiorari, W.R.C. 5-6. When his claim is tethered to the reality of the trial record, Robbins's unwillingness to withdraw his *Faretta* waiver is conclusively established by his refusal to accept the reinstatement of the public defender as his counsel. J.A. 323-24. He tacitly admits his refusal, but now contends that the court had an obligation to explore the basis for a newly-asserted conflict. R.B. 20. The claim is spurious.

A week before trial, Robbins asked for the assistance of counsel to help him with the public speaking at trial. J.A. 320. The court denied him advisory counsel but offered to reappoint the public defender, unless there was a conflict. J.A. 322-23. Robbins responded that his family had filed a lawsuit against the public defender's office and the county. J.A. 323. He did not name individual deputies. *Id.* He provided no evidence of the suit then, nor has he come forth with any in all the years since that time. The court, finding that Robbins was engaging in further dilatory tactics, denied the motion. J.A. 323-24.

On these facts, the denial was proper. *People v. Hardy*, 2 Cal. 4th 86, 133-38, 5 Cal. Rptr. 2d 796 (Cal. 1992). Appellate counsel properly refused to fabricate a counsel issue without record support.

5. Refusal to order discovery of the decedent's arrest record. R.B. 21.

Robbins was not entitled to his victim's arrest record, because it was irrelevant to his defense of denial. Under California law, a discovery motion is addressed to the sound discretion of the trial judge. *Hill v. Superior Court*, 10 Cal. 3d 812, 816-17, 822, 112 Cal. Rptr. 257 (Cal. 1974). The victim's history of violence would have been admissible only if Robbins had claimed self-defense. However, he denied culpability from his earliest appearances through counsel in municipal court ("[T]he defense . . . is that he didn't do it,") to his last words of pro per jury argument ("I am not contesting the fact that a very serious crime occurred, just that I did not do it"). C.T. 9-10; R.T. 310. In the face of Robbins's unwavering defense of denial, the victim's aggressiveness was not relevant to any issue in the case. There was nothing to argue on appeal.

6. Alleged failure to serve Robbins's trial subpoenas. R.B. 21-22.

Robbins complains that the court never subpoenaed the second investigator, Deputy Jones, or the fingerprint officer, Deputy Rottler. There is no basis for this issue.

Although a defendant has the right to subpoena witnesses, the trial court retains the inherent power to control the issuance of subpoenas. *People v. Smith*, 38 Cal. 3d 945, 958-59, 216 Cal. Rptr. 98 (Cal. 1985); *People v. Fernandez*, 222 Cal. App. 2d 760, 768-69, 35 Cal. Rptr. 370 (Cal. 1963). The court could not serve Deputy Jones,

because he had retired, and the court had no address for him. J.A. 294-95. In addition, his testimony would have been cumulative to that of his partner, who did testify. The judge believed that the prosecutor had subpoenaed Deputy Rottler, the officer who dusted the scene for fingerprints. J.A. 296-97. However, the prosecution offered no fingerprint evidence at trial, and Deputy Rottler did not appear. Robbins could not have made the required showing of prejudice on appeal, *see* Art. VI, §13, Cal. Const., because the best testimony Rottler could have given for Robbins was that his fingerprints were not found at the scene. In Rottler's absence, there was no evidence that Robbins's fingerprints were found at the scene. Competent appellate counsel would not raise such a claim.

7. The reasonable doubt instruction. R.B. 22.

Robbins contends that the validity of the reasonable doubt instruction was an open question when his case was appealed, and appellate counsel should have asserted the issue, even though the instruction was later approved by this Court in *Victor v. Nebraska*, 511 U.S. 1, 10-17 (1994). Before certiorari was granted in *Victor*, California appellate courts would have affirmed the instruction on stare decisis grounds. *People v. Sandoval*, 4 Cal. 4th 155, 185-86, 14 Cal. Rptr. 2d 342 (Cal. 1992). While *Victor* was pending, the state courts held onto reasonable-doubt-instruction cases and ultimately affirmed them when *Victor* had been decided. Robbins cannot show that counsel's deficient performance rendered the proceeding unfair or the result unreliable. *Lockhart v. Fretwell*, 506 U.S. at 369-70. This is the paradigm of a frivolous issue.

8. Alleged failure to hear Robbins's motion to dismiss. R.B. 22-23.

Once again turning his back on the facts, Robbins asserts that the trial court never allowed him to argue his "*Hitch/Trombetta*" motion to dismiss for failure to preserve evidence. R.B. 5, 22. He further represents that "[t]he court evidently (but mistakenly) believed that another judge had decided the motion. J.A. 285-86." R.B. 5 n.3. Once again, the record belies his claim:

> The Defendant: I believe *there is a couple other motions there I would like to have reheard*; a motion for advisory counsel and also a motion for -- Hitch/Trombetta motion.
>
> The Court: As far as I know, those motions have been heard.
>
> The Defendant: *Yes. I would like to have them reheard, Your Honor.*
>
> The Court: You don't do that. Once a motion is heard, then you don't transfer to another court and ask to start all over again. ¶ . . . You can't retry and relitigate the same things in the trial court over and over again.
>
> The Defendant: All right.

J.A. 285-86 (emphasis added). In the face of Robbins's admission that he sought rehearing, it would have been preposterous for appellate counsel to raise this issue on direct appeal.

9. Alleged improper ex parte contract. R.B. 23.

Adverting to the service of Robbins's subpoenas, the judge said, "I was inquiring of the prosecutor as to the officers -- there is duplication." J.A. 297. On the sand of that insubstantial comment, Robbins builds a fantasy claim: an ex parte contact. Initially, there is every reason to assume that the judge made the inquiry in open court,

in the presence of Robbins, in an unreported exchange; and Robbins did not met his burden of showing otherwise. Even if an ex parte exchange actually occurred, Robbins has never suggested how the appellate record showed that he was prejudiced by the alleged contact. Appellate counsel properly found the issue was not arguable.

In sum, the appellate process exists to correct errors which rendered the trial unfair. *Evitts v. Lucey*, 469 U.S. at 396. Although Robbins's pro per election was a poor choice, he received a fair trial and a fair appeal. None of the issues he has raised in federal court undermines confidence in the fairness of those proceedings. Put another way, Robbins cannot possibly show he was prejudiced within the meaning of *Strickland* because these nine claims were not asserted on appeal. The lower federal courts have improperly relieved him of many of the inevitable consequences of his *Faretta* waiver, to the state's detriment. This Court should rectify that error.

III. THE NINTH CIRCUIT VIOLATED *TEAGUE v. LANE*

Robbins contends this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), is inapplicable, because *Anders* and *Douglas* antedated *Feggans* and *Wende*. R.B. 45-49. The Warden disagrees.

It is not enough for Robbins to cite to a pre-existing case. In order to avoid *Teague*'s new-rule proscription, that case must *dictate* or *compel* the result he now seeks. *O'Dell v. Netherland*, 521 U.S. 151, 160-64 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 530-31 (1997); *Saffle v. Parks*, 494 U.S. 484, 489 (1990). Because *Anders* did not dictate the result he seeks, the California Supreme Court's longstanding interpretation of *Anders*'s requirements is entitled to *Teague* deference on federal habeas corpus.

Robbins's claim that *Wende* violates state law, R.B. 46, is not cognizable on federal habeas corpus, *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Pulley v. Harris*, 465 U.S.

37, 41 (1989), and is immaterial to the *Teague* question. *See Sawyer v. Smith*, 497 U.S. 227, 239-41 (1990).

CONCLUSION

For the stated reasons, the Warden respectfully urges this Court to uphold California's *Wende* procedure and institute a *Strickland* test for prejudice or, in the alternative, to find that the lower courts applied a new rule in violation of *Teague v. Lane*.

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Respectfully submitted,

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